

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
LICENSE 51247 and  
MERCHANT MARINER'S DOCUMENT NO. 433-24-758-D1  
Issued to: Walter H. Harris

DECISION OF THE VICE COMMANDANT ON APPEAL  
UNITED STATES COAST GUARD

2321

Walter H. Harris

This appeal has been taken in accordance with Title 46 U.S.C. B239) and 46 CFR 5.30-1.

By order dates 8 February 1982, an Administrative Law Judge of the United States Coast Guard at Boston, Massachusetts suspended Appellant's license for two months, upon finding him guilty of negligence. The specification found proved alleged that while serving as master aboard SS COVE EXPLORER under authority of the above captioned license, between 21 November 1981 and 1 December 1981, Appellant, while responsible for the material condition of the vessel, operated the vessel in an unseaworthy condition, to wit, fractured and wasted frames, longitudinal and side plating in the bow section of the vessel.

The hearing was held at Boston, Massachusetts on 7 January 1982, January 1982 and 15 January 1982.

At the hearing, Appellant was represented by professional counsel. Appellant pled not guilty to the charge and specification.

The Investigating Officer introduced into evidence the testimony of five witnesses and eight exhibits. Counsel moved to dismiss at the end of the Government's case but waived any further defense. Subsequent to the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge of negligence was proved.

The decision was served on 11 February 1982. An Appeal was timely filed and perfected on 11 March 1982. A temporary license was issued on 5 April 1982.

FINDINGS OF FACT

On 20 November 1981, Walter H. Harris, Appellant, reported aboard the COVE EXPLORER as relief master. At that time, Chief Mate Zaenger toured the main deck with Appellant and told him of

the vessel's structural problems in the bow, specifically, that there was a fractured web frame in the forepeak tank. There was a seepage of sea water in the forepeak tank through the side shell of the vessel and there were also two cement patches in the bow section which had been installed about 1 November 1981. Appellant served aboard the COVE EXPLORER as master under the authority of his license from 20 November 1981 to 1 December 1981.

On 21 November 1981, the COVE EXPLORER sailed in ballast from the port of Providence, Rhode Island, to Wilmington, North Carolina, where she loaded a cargo of fuel oil for discharge in Salem, Massachusetts. The COVE EXPLORER arrived at the port of Salem on 30 November 1981.

On 30 November 1981, the COVE EXPLORER was boarded in Salem by CWO Robert E. Wiseman, USCG, who inspected the vessel's hull. Mr. Wiseman withdrew the vessel's Certificate of Inspection based upon his findings. The vessel was permitted to sail to Boston, Massachusetts for repairs and inspections.

On 1 December 1981, Lt Werner W. Splettstoesser, USCG, inspected the COVE EXPLORER in Boston, Massachusetts. It was Lt. Splettstoesser's opinion that on 1 December 1981 the COVE EXPLORER was unseaworthy.

On 5 December 1981, the COVE EXPLORER was surveyed by Thomas W. Parker, an employee of the American Bureau of Shipping (ABS). It was the opinion of Mr. Parker that on 5 December 1981, the COVE EXPLORER was not fit for ocean voyages.

#### BASES OF APPEAL

This appeal has been taken from the Decision and Order of the Administrative Law Judge. Appellant asserts that the Administrative Law Judge erred:

1. when he held that the charge and specification were proper;
2. when he denied Appellant's motion to dismiss;
3. when he held that evidence offered by the Coast Guard was sufficient to prove the charge of negligence;
4. when he interrogated witnesses on the stand; and
5. when he informed Appellant of his right to file written proposed findings and conclusions.

APPEARANCES: Kneeland, Kydd & Handy, by Frank H. Handy, Jr.

## OPINION

### I

Appellant argues that the finding of negligence must be reversed because the Coast Guard failed to charge the specific regulation or statute alleged to have been violated. This argument is without merit. Appellant cites 46 CFR 5.05-20(b), which provides that where the charge is "violation of statute" or "violation of regulation", the specification must state the specific statute or regulation allegedly violated. This requirement is not applicable in this case, since Appellant was charged with "negligence", under 46 CFR 5.05-20(a)(2). The specification, which sets forth the facts which form the basis of the negligence charge as required under 46 CFR 5.05-17, was entirely proper.

### II

Appellant contends that the Administrative Law Judge erred in denying Appellant's Motion to Dismiss filed at the close of the Government's case. Appellant states only that the motion rested on grounds that the charge and specification were not proved. However, a motion to dismiss should not be granted unless no evidence has been introduced in support of one or more required elements of the government's case. See Appeal Decision 2294 (TITTONIS). In this case, substantial evidence adequate to establish a prima facie case of negligence was introduced. Thus the decision of the Administrative Law Judge denying the Appellant's motion to dismiss was entirely proper.

### III

Appellant next contends that the evidence offered by the Coast Guard Investigating Officer was insufficient to prove the charge of negligence. Specifically, Appellant charges that no evidence of a duty was introduced by the Coast Guard, it was not shown by substantial evidence that Appellant failed to act as a reasonably prudent person under the circumstances.

Negligence is defined in 46 CFR 5.05-20(a)(2) as "the commission of an act which a reasonably prudent person of the same station, under the same circumstances, would not commit, or the

failure to perform an act which reasonably prudent person of the same station, under the same circumstances, would not fail to perform." In order to prove the charge of negligence it is necessary to prove that Appellant's conduct in some manner failed to conform to the standard of care required of the reasonably prudent master under the same circumstances confronted by Appellant. See Appeal Decision 2282 (LITTLEFIELD).

The master is regarded as the individual primarily charged with the care and safety of the vessel and crew. See Appeal Decision 2098 (CORDISH). In order to ensure the proper management and safety of his vessel and crew, the master must keep himself well informed of any defects in the vessel which could pose a significant hazard to life or property. See Appeal Decision 2307 (GABOURY).

The record clearly shows that when Appellant came aboard as relief master, his chief mate informed him of the serious structural problems in the bow area of the vessel. There is no evidence that Appellant investigated the extent of these problems prior to sailing, or at any time thereafter.

Evidence presented by the Investigating Officer included the detailed evaluations made by two Coast Guard marine inspectors and one American Bureau of Shipping (ABS) surveyor that the vessel was in an unseaworthy condition. I have reviewed the entire testimony of each of these witnesses and am convinced that the COVE EXPLORER was indeed in such a condition as to be unseaworthy during the relevant time period.

Appellant hazarded not only the vessel and the crew but also the marine environment through which he passed and the ports which he entered by bringing an unseaworthy vessel laden with thousands of barrel of oil from Wilmington, North Carolina into Salem, Massachusetts. The Administrative Law Judge's conclusion that Appellant failed to act as a reasonably prudent master under the same circumstances would have acted is supported by substantial and uncontradicted evidence.

#### IV

Appellant asserts that the Administrative Law Judge improperly donned the "mantle of prosecutor" when he questioned a witness on the stand. This argument is without merit.

The Administrative Law Judge is required to conduct hearings in a manner so as to bring out all relevant facts and ensure a fair and impartial hearing. 46 CFR 5.20-1(a). In order to do so, he is

specifically authorized to question witnesses. 46 CFR 5.20-90(a). The record in this case does not reveal even the slightest appearance of impropriety. In the course of direct examination by the Investigating Officer, the Administrative Law Judge asked several questions of the witness, CWO Wiseman, A Marine Inspector, in order to determine whether he believed the vessel to be seaworthy. The seaworthiness of the vessel is one of the central issues in the case. Thus, Appellant misconstrues the duty and function of the Administrative Law Judge in this proceeding when he suggests that the questions asked in order to clarify testimony were in any way improper. See Appeal Decisions 550 (DAN), 2013 (BRITTON) and 2083 (SYBIAK).

V

Appellant lists as a ground for appeal the adverse decision of the Administrative Law Judge on his requests for proposed findings. Yet no proposed findings were offered by Appellant, during or at any time subsequent to the hearing. In fact, the record clearly demonstrates that Appellant was informed at the hearing of his right to file written proposed findings and conclusions and orally waived the right to do so. I cannot, therefore, find merit in Appellant's contention.

CONCLUSION

There was substantial evidence of a reliable and probative nature to support the findings of the Administrative Law Judge. The hearing was fair and conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge, dated at Boston, Massachusetts on 8 February 1982 is AFFIRMED.

B.L. STABILE  
Vice Admiral, U. S. Coast Guard  
VICE COMMANDANT

Signed at Washington, D.C. this 7th day of September 1983.